No. 138

In the Supreme Court of the United States

October Term, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,

GEORGE CHESLEY HOYT,
Assistant Attorney General,

ALAN S. ROSENTHAL,
HERBERT P. MINGES,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 138

UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Palmieri, D.J.) covering 11 of the 14 libels involved (R. 64–66) is reported as *A. H. Bull Steamship Co.* v. *United States*, 141 F. Supp. 58. The opinion of the United States District Court for the Southern District of New York (Herlands, D.J.) covering the other three libels (R. 102) is not reported, but it is set forth in footnote 2 to the opinion of the three-judge panel of the United States Court of Appeals for the Second Circuit reported at 265 F. 2d 136, 140 (R. 108). The opinion of the three-judge panel of the Court of Appeals, dated September 25, 1957 (R. 104–113), the

opinion of the Court of Appeals on petition for rehearing *en banc*, dated July 28, 1958 (R. 115–135), and the opinion of the Court of Appeals denying the petition for further rehearing *en banc*, dated March 26, 1959 (R. 137–140), are reported at 265 F. 2d 136.

JURISDICTION

The opinion of the three-judge panel of the Court of Appeals was entered on September 25, 1957 (R. 107). Respondents filed a timely petition for rehearing *en banc* which was granted on December 19, 1957 (R. 114). The judgments of the Court of Appeals, sitting *en banc*, were entered on July 28, 1958 (R. 136). The United States then filed a petition for further rehearing *en banc* which was entertained by the Court of Appeals. By its opinion and order of March 26, 1959, the Court of Appeals denied the petition for further rehearing *en banc* (R. 137–141). The Government's petition for certiorari was filed on June 23, 1959, and was granted on October 19, 1959 (R. 142). 361 U.S. 861. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a circuit judge who retires prior to the decision of a court of appeals sitting on rehearing *en banc* is an "active" circuit judge entitled to participate in the *en banc* decision under 28 U.S.C. 46(c).

STATUTE INVOLVED

28 U.S.C. 46(c) provides:

> Cases and controversies shall be heard and determined by a court or division of not more

than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

Relevant portions of other statutory provisions are set forth in the Appendix, *infra*, pp. 30–34.

STATEMENT

1. The nature of the litigation

Each of the respondents chartered ships from the Government pursuant to the Merchant Ship Sales Act, 50 U.S.C. App. 1735, *et seq.*, and agreed in Clause 13 [1] of their charters to terms which made additional charter hire dependent in part upon the amount of profit realized by the charterer. Respondents' libels below were predicated on the claim that the Maritime Commission, in providing for a "sliding scale" whereby the Government might obtain as much as 90% of the profits in excess of $300 per day, per vessel, above a certain return on employed capital, violated the provisions of Section 709(a) of the Merchant Marine Act of 1936, 49 Stat. 1985, 46 U.S.C. 1199(a), allegedly limiting the Government to a flat 50% of profits above the return on employed capital (R. 1–8, 24–30). Respondents thus sought to recover amounts of additional charter hire in excess of this 50% rate, on the theory that such amounts were illegally assessed by the Commission (R. 4–7, 25–28). In addition, certain of the libels challenged, *inter alia*,

[1] Clause 13 of the charters is set out in its entirety as footnote 3 to the July 28, 1958 opinion of the Court of Appeals on rehearing *en banc* (R. 120–121).

the Maritime Commission's determinations under the charters as to the amount of "capital necessarily employed," "post redelivery overhead expenses," the "cost of repairing latent defects," "management fees" and "agency fees."

In each case, the Government moved to dismiss the libels because of lack of jurisdiction, on the ground that all of the claims were barred by the two-year limitation prescribed by the Suits in Admiralty Act, 46 U.S.C. 745 (R. 17).

2. The proceedings below

In the District Court, the libels were dismissed by Judges Palmieri and Herlands as time-barred, on the the authority of the Second Circuit decisions in *Sword Line, Inc.* v. *United States*, 228 F. 2d 344, affirmed on rehearing, 230 F. 2d 75, affirmed on the question of admiralty jurisdiction, 351 U.S. 976, and *American Eastern Corp.* v. *United States*, 133 F. Supp. 11 (S.D.N.Y.), affirmed *per curiam*, 231 F. 2d 664, certiorari denied, 351 U.S. 983[2] (R. 64–66, 102).

These decisions were affirmed[3] on September 25, 1957, by a three-judge panel of the Second Circuit consisting of active Circuit Judges Hincks and Medina and retired District Judge Leibell. The court

[2] Judge Palmieri's opinion, as we have noted, is reported at 141 F. Supp. 58, and Judge Herlands' can be found in footnote 2 to the opinion of the three-judge panel of the Court of Appeals (R. 108).

[3] The appeal of one of the libelants—Dichmann, Wright and Pugh—was dismissed as an interlocutory admiralty appeal filed out of time (R. 109). On the *en banc* reversal with regard to the other libels, the decision as to this one appeal was reaffirmed (R. 119–120).

ruled that each of the various arguments advanced by respondents to avoid the statute of limitations had been urged by the libelants on the identical issue in the earlier *Sword Line* and *American Eastern* cases, and had been disposed of against the libelants by those decisions (R. 111–112).

On December 19, 1957, the Court of Appeals entered an order granting libelants' petition for a rehearing *en banc* on the question of the statute of limitations and further ordered that argument was to be confined to briefs alone (R. 114). The order, signed by Judge Medina who was at that time an active circuit judge, required that briefs be submitted within twenty days. On March 1, 1958, Judge Medina retired pursuant to the provisions of 28 U.S.C. 371(b) (App., *infra*, pp. 33–34) (R. 135, 137).

On July 28, 1958, almost five months subsequent to Judge Medina's retirement, the Court of Appeals handed down its *en banc* decision withdrawing the earlier panel opinion and reversing the District Court decisions.[1] The majority consisted of active Circuit Judges Hincks and Moore and retired Circuit Judge Medina; the dissenters were active Circuit Judges Clark and Waterman.[2] The majority, in an opinion written by Judge Hincks, overruled the prior decisions in *Sword Line* and *American Eastern* and held that Clause 13 of the charters established an

[1] Active Circuit Judge Lumbard did not participate in the *en banc* proceeding because of a prior connection with these cases as United States Attorney.

[2] There had been no indication, following Judge Medina's retirement, that he would participate in the decision of the cases on rehearing.

adequate, "*prima facie*, showing of jurisdiction" (R. 123–125). The court further determined, however, that the parties should be given an opportunity to adduce evidence respecting the intended meaning of Clause 13. Accordingly, it remanded the causes to the District Court for disposition on the issue of limitations which might take into account such evidence as might be introduced (R. 124).

In a dissenting opinion concurred in by Judge Waterman, Chief Judge Clark observed that the normal rule in actions for unjust enrichment,[5] as declared by the Second Circuit in ruling on the same question of limitations in *Sword Line* and *American Eastern*, which also involved charter Clause 13, is that the period begins to run when the first payment of additional charter hire is made (R. 127–128). This rule should be set aside, he said, only if the charter plainly manifests a contrary purpose; yet, the majority had found no such contrary expression of intention in Clause 13. Moreover, analysis of this clause and the underlying regulations demonstrated to him that they were in no way concerned with libelants' claim of illegal assessment of additional charter hire and that the Second Circuit's earlier decisions in *Sword Line* and *American Eastern* were clearly correct (R. 130–134). Finally, Judge Clark expressed doubt, in view of the provisions of 28 U.S.C. 46(c), *supra*, pp. 2–3, as to the validity of Judge Me-

[5] These libels for allegedly illegal assessment of additional charter hire were characterized as actions for unjust enrichment in this Court's decision in *Sword Line, Inc.* v. *United States*, 351 U.S. 976.

dina's participation in the *en banc* decision reached subsequent to his retirement (R. 135).

The Government then filed a petition for further rehearing *en banc*, directed primarily to the question of the validity of Judge Medina's participation in the *en banc* determination of July 28, 1958. On March 26, 1959, this petition was denied, the court dividing as it had on the prior *en banc* decision. The majority, consisting of Judges Hincks, Moore and Medina, ruled (in an opinion by Judge Hincks) that once an *en banc* court or a three-judge panel is initially constituted according to law, there is no need for the court "to suspend its * * * task" or "reconstitute itself" upon the retirement of an active judge (R. 138). The majority also derived support for its view that Judge Medina's participation in the *en banc* decision was valid from other provisions of the Judicial Code, namely, 28 U.S.C. 43(b), 294(b), and 296 (App., *infra*, pp. 30–31, 32–33) (R. 137–139).

In a separate statement, Judges Clark and Waterman expressed the opinion that Judge Medina's action was precluded by the plain language of 28 U.S.C. 46(c). Moreover, examination of other provisions of the Judicial Code confirmed their view that active judges of the court of appeals alone could participate in *en banc* decisions of the circuit. Pointing to similar conclusions by other courts of appeals in analogous situations, Judges Clark and Waterman underscored the "obviously indicated policy" of 28 U.S.C. 46(c) of permitting only active circuit judges to determine "the major doctrinal trends of the future for their court" (R. 140). It was their conclusion

that the *en banc* decision of July 28, 1958, was "void for lack of a valid majority vote" by reason of Judge Medina's participation, and that the decrees of the District Court "must stand affirmed by an equally divided court" (R. 140).

3. The petitions for writs of certiorari

The Government's petition for a writ of certiorari in this case, No. 138, was expressly limited to the question of the validity of Judge Medina's participation in the *en banc* decision of the court below. As pointed out in its memorandum to this Court in Nos. 322 and 334, this Term, the Government failed to petition on the limitations question, not because it considered the *en banc* determination on this issue correct, but because (1) the identical issue had not been taken by this Court on certiorari in the recent *Sword Line* and *American Eastern* decisions, and (2) a valid *en banc* decision by the Second Circuit was deemed a prerequisite to certiorari review by this Court.

In Nos. 322 and 334, this Term, respondents in this case, No. 138, have attempted to bring the limitations issue before the Court by conditional cross-petitions seeking writs of certiorari if the Government's petition on the *en banc* issue was granted. The Court has not as yet taken any action with regard to these conditional cross-petitions.

SUMMARY OF ARGUMENT

I

The participation by Judge Medina in the *en banc* decision below subsequent to his retirement from ac-

tive service—a participation which resulted in a majority for reversal of previous decisions in this case and the overruling of two recent Second Circuit precedents—was precluded by 28 U.S.C. 46(c). Section 46(c) plainly limits the power to hear *and determine*, in each phase of Court of Appeals *en banc* proceedings, to active circuit judges of the circuit involved and provides no exception for judges who, like Judge Medina here, retire subsequent to *en banc* hearing but prior to *en banc* determination. The policy of the statute was obviously, in the words of the dissent below, to permit only "active circuit judges [to] determine the major doctrinal trends of the future for their court" (R. 140). And the textual meaning of the statute is supported by the available legislative history.

Nor can the respondents, as the majority below sought to do, look to other provisions of the Judicial Code, dealing with designation and assignment to duty, to provide Judge Medina with the power to act on the *en banc* rehearing. These provisions confer on judges designated and assigned only those powers not restricted under such specific statutory authorization as Section 46(c) to active circuit judges of the circuit involved. Any other interpretation would render completely meaningless such provisions as Section 46(c) by which the power to act in specified circumstances is limited to active judges. And reliance on these other provisions requires the conclusion that judges from any other federal court may, solely by virtue of designation and assignment, participate in *en banc* resolution of matters by a particular court

of appeals, a result incompatible with the policy and purposes of *en banc* proceedings.

II

Judge Medina's participation in the *en banc* decision below, contrary to the controlling provisions of Section 46(c), renders that *en banc* decision void. This Court has consistently held, in accord with firmly established principle, that whenever a judge acts beyond his statutory powers, the decision rendered by him or in which he took part is a nullity. *American Construction Company* v. *Jacksonville Railway*, 148 U.S. 372; *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479; *Frad* v. *Kelly*, 302 U.S. 312. Accordingly, the *en banc* decision below must be vacated and the case remanded for further proceedings by the Second Circuit in conformity with the provisions of 28 U.S.C. 46(c).

ARGUMENT

I. The express provisions and underlying policy of 28 U.S.C. 46(c), governing *en banc* proceedings, precluded retired Judge Medina's participation in the *en banc* decision in this case

A. The statute and its basic purposes

1. 28 U.S.C. 46(c), *supra*, pp. 2–3, enacted and incorporated into the Judicial Code in 1948, clearly appears to us to preclude the vote, in *en banc* decisions, of any judge other than an active circuit judge of the particular circuit sitting *en banc*. The statute provides in its opening sentence, dealing with ordinary panel dispositions of courts of appeals, that cases shall be heard and determined by a court or division of not more than three judges. An exception is then pro-

vided for a hearing or rehearing *en banc* "ordered by a majority of the circuit judges of the circuit who are in active service". If a hearing or rehearing *en banc* is granted by a majority of the active circuit judges, then the court *en banc* "shall consist of all active circuit judges of the circuit".

In view of these provisions, it is plain that in a court of appeals panel proceeding, as opposed to the *en banc* situation, three judges of the court, either active judges of the circuit involved or judges otherwise qualified and acting under designation and assignment, have the power to hear and determine cases and controversies. In the *en banc* proceeding, on the other hand, it is the active circuit judges of the circuit, and only these judges, who have the power to hear and determine. Hence, while Judge Medina had the power under 28 U.S.C. 46(c) to participate in the decision below to grant rehearing *en banc* on December 19, 1957, and to hear the case (by studying the briefs) until March 1, 1958, his retirement on the latter date precluded him from participating in the *en banc* decision of July 28, 1958.

In reaching a contrary conclusion, the majority below appears to have drawn a distinction between the situation where retirement occurs before the grant of a petition to rehear *en banc* and the situation where (as here) the retirement occurs in the interval between such grant and the date of decision (R. 138). But this does not seem to us a permissible interpretation of the statute. As we have seen, the grant of power under 28 U.S.C. 46(c) extends to both the hearing *and the determination* of cases, and partici-

pation in each of these phases is expressly reserved, in the *en banc* situation, to active circuit judges of the circuit. There is no basis under 28 U.S.C. 46(c) for the majority's suggestion that the power to vote on the petition for rehearing *en banc*, and to hear the case *en banc* at that time because of active service status, confers the power subsequently to determine the case *en banc* regardless of active or retired status on the date of decision. In short, the reading of the statute by the majority below simply abrogates that part of the statutory grant of power governing the *determination* of *en banc* cases and controversies.

This distinction drawn by the majority, furthermore, creates a result which, upon examination of each aspect of the *en banc* proceeding under 28 U.S.C. 46(c), seems plainly unintended. As the majority's distinction admits, and as the statute makes clear, had Judge Medina retired prior to the court's action on the petition for rehearing *en banc*, he would not have been qualified (under the Second Circuit's own practice) to vote for the grant of that petition (see discussion, *infra*, pp. 17; 23–24, fn. 23). It would have made no difference that he had acquired familiarity with the case as a member of the three-judge panel, that he had been an active circuit judge when the petition for rehearing *en banc* was filed, that he had considered the briefs urging and opposing such a rehearing *en banc*, or that he had definite views about the importance of the case in terms of *en banc* resolution. He would, nevertheless, not have been empowered to vote on the granting or denial of the petition for an *en banc* rehearing. In these circumstances, it is anomalous

to suggest, as did the majority below, that, merely because the judge's retirement does not occur until after the petition has been acted upon (but prior to the hearing or determination on the merits), he is not precluded from participation in the ultimate decision on the merits. The necessary status for the judge's power to determine, as well as to hear, is clearly the same under 28 U.S.C. 46(c) for each of the phases of the *en banc* procedure: that of an active circuit judge of the circuit implementing the *en banc* procedure.

Moreover, the majority's professed fear that the Government's interpretation of 28 U.S.C. 46(c) would require an *en banc* court to "suspend its judicial task" and "reconstitute itself" (R. 138) appears highly illusory. The sole effect of Judge Medina's retirement from active service as of March 1, 1958, with regard to this *en banc* proceeding, was that the case would be carried through to ultimate disposition by four, rather than five, Second Circuit judges. There was no need for a new hearing as a result of Judge Medina's retirement and consequent disqualification under 28 U.S.C. 46(c).[6]

As for the majority's concern with "suspen[sion of the] judicial task", and "reconstitution" of the court upon the appointment of a new active judge during *en banc* deliberation, this possible consequence would obtain equally in the situation where the retirement

[6] As we have noted, there was no oral hearing on the limitations question by the *en banc* court here, but merely consideration of briefs under the December 19, 1957, order of the court granting the petition for rehearing *en banc* (R. 114).

took place before the vote on whether to grant rehearing *en banc*, but the appointment of the successor did not occur until after rehearing had been ordered and submitted. In that situation, as we have shown, the retired judge clearly would lack authority to participate under Section 46(c). The court of appeals would have the same choice as in the case where *both* the retirement and the appointment of a successor judge occurred after the rehearing had been submitted. It might proceed to decision on the merit without the participation of either the retired judge or his successor. Or it might permit the new active judge to participate (possibly without reargument, at least in a case, such as this, which had been submitted on briefs to the court *en banc*).[7]

In sum, the considerations to which the majority below point have no bearing upon the statutory mandate. Whatever may be the effect of the appointment of a new judge from the standpoint of the necessity to reconstitute the *en banc* court, Congress has decreed that a retired circuit judge shall not participate in *en banc* determinations.[8]

---

[7] In connection with what we consider to be the clear mandate of 28 U.S.C. 46(c) as to the participation of retired judges, it is significant, we believe, that retired Justices of this Court do not participate in its decisions once they have retired, even in cases or matters in which they have heard argument or participated in earlier consideration. Under 28 U.S.C. 294(a), retired Justices may only be designated and assigned to duty in courts other than the Supreme Court. We view this provision as parallel to the provision of 28 U.S.C. 46(c) limiting *en banc* proceedings to active circuit judges.

[8] The opinion below, as the dissenters pointed out, provides for a "freezing in" of a particular group of judges regardless of active or retired status (R. 140). Hence, had Judge

2. Judge Medina's participation in the *en banc* decision was not only contrary to the controlling statutory provision but was also at odds with the basic purposes motivating its enactment. The raison d' être for *en banc* proceedings has been set forth by Judge Maris in describing the *en banc* procedure of the Third Circuit.[9] *Hearing and Rehearing Cases in Banc*, 14 F.R.D. 91. While noting that the "guiding consideration" for convening *en banc* was "the importance and the difficulty of the problem presented" (14 F.R.D. at 94), Judge Maris observed with particularity that a most crucial concern calling for *en banc* resolution was the presence of "serious strains in the court" on a given question which, if allowed to stand, would result in diametrically opposite panel conclusions.[10] 14 F.R.D. at 96. The same essential utility of the *en banc* proceeding has been pointed out by Mr. Justice Frankfurter in his concurring

---

Medina's successor been appointed and qualified prior to *en banc* disposition, under the majority's view he might be precluded from participating in the decision whereas Judge Medina would not. Or the majority's view might permit both to participate. The confusion as to the meaning of Section 46(c) engendered by the majority's approach is created by its refusal to recognize that the statute permits only active service judges to participate at each and every stage of the *en banc* proceeding.

[9] See fn. 17, *infra*.

[10] Judge Maris also made the observation, relevant to respondents' attempt to bring the limitations issue to this Court, that while this Court might correct matters by review on certiorari, the Supreme Court "should not have to resolve conflicts of decision within a single court. The procedure in banc enables the court [of appeals] itself to deal authoritatively with problems of this nature, thus relieving the burden of the Supreme Court". 14 F.R.D. at 96.

opinion in *Western Pacific Railroad Case,* 345 U.S. 247, 270.[11] And it is evident from the opinions below and the prior history of the identical limitations issue in *Sword Line* and *American Eastern* that this consideration constituted the basis for the *en banc* proceeding by the Second Circuit in this case.

Hence, a most significant purpose of *en banc* proceedings is to avoid intra-circuit conflict by allowing a majority of the full court to hear a case and establish a single precedent binding on the circuit in the future. Cf. *Wisniewski* v. *United States,* 353 U.S. 901. In granting this power to hear and determine *en banc,* Congress obviously had several choices available with regard to the equally important question of the make-up of the *en banc* tribunal. In view of the designation and assignment provisions of the Judicial Code,[12] it was possible to grant the power for such determinations, not only to both active and retired members of the particular court of appeals, but also to judges of other federal courts. Section 46(c), however, left congressional intention entirely clear on this point. Only active judges of the circuit to which the *en banc* application was addressed were to hear and determine *en banc.*

In implementing these essential purposes of the *en banc* procedure, it is hardly surprising that Congress limited the power to act in *en banc* cases to circuit judges of the circuit. While a federal judge from another court might be designated and assigned to sit on a court of appeals panel, Congress believed that

[11] See also, Note, 63 Harvard L. Rev. 1449 (1950).

[12] 28 U.S.C. 291–296. See *infra,* pp. 20–23, 30–34.

it would not be fitting to allow him either to participate in resolution of a conflict among the members of that circuit or to aid in establishing major doctrinal trends for it. Nor is it any the more surprising, we submit, that Congress further restricted the *en banc* powers to *active* circuit judges of the particular circuit. There are obvious differences in status and concomitant powers between active and retired judges of a given court,[13] and for the extraordinary purposes of the *en banc* proceeding, Congress deemed it wiser to restrict the power to determine cases of such overriding importance to the permanent active membership.

Indeed, the respondents, in common with the majority opinion below, do not seriously question that 28 U.S.C. 46(c) precludes participation in *en banc* determinations by judges who have retired from active service *prior* to the *en banc* proceeding. Their position, which, as we have pointed out (*supra*, pp. 10–14), is flatly refuted by the statutory language, is essentially that there is no statutory purpose achieved by barring Judge Medina's vote when his retirement took place after the commencement of *en banc* proceedings and only five months prior to ultimate disposition.

This contention, however, ignores the cardinal point that the crucial act, in the history of any particular *en banc* proceeding, is the ultimate resolution, *i.e.*, as here, the decision *en banc* avoiding an intra-circuit conflict, or, in other cases, resolving a question considered to be of outstanding importance. As Mr. Justice

[13] See fn. 20, *infra*, p. 22.

Frankfurter observed in *Western Pacific Railroad Case*, 345 U.S. 247, 270:

> * * * [D]eterminations *en banc* are indicated whenever it seems likely that a majority of all the active judges *would reach a different result* than the panel assigned to hear a case or which has heard it. * * * [Emphasis added.]

And since it is the ultimate result (and its consequences) which are of greatest significance, it is surely the power to participate in fashioning that end-result to which the active status requirement of the statute is primarily directed. Since Judge Medina lacked that qualification at the critical moment, the policy of restricting such decisions to active judges of the circuit was aborted by the majority opinion below.

3. Although the legislative history of Section 46(c) itself sheds little light on the issue here,[14] the history of a substantially similar predecessor bill (S. 1053, 77th Cong., 1st Sess.) which died in the Senate supports our interpretation. In hearings on that bill, Circuit Judges Groner and Biggs, testifying to the importance of *en banc* determinations in certain classes of cases, referred repeatedly to the number of active circuit judges in the various circuits who would participate in such decisions. Hearings before a Subcom-

[14] The Reviser's Note to Section 46(c) states that the provision was intended to codify the result in *Textile Mills Corp.* v. *Commissioner*, 314 U.S. 326. In *Textile Mills*, this Court, ruling that *en banc* hearings involving more than three circuit judges were valid under the then applicable statute, upheld a rule of the Third Circuit permitting all active circuit judges to participate in *en banc* proceedings. In so doing, the Court carefully distinguished "active" from "retired." 314 U.S. at 327.

mittee of the Senate Committee on the Judiciary on S. 1050, S. 1051, S. 1052, S. 1053, S. 1054, and H.R. 138, 77th Cong., 1st Sess., at pp. 14–15, 39–41. No mention was made during these hearings by anyone that retired judges might participate in the ultimate disposition of *en banc* cases, despite their possible participation in resolution or hearing of the case apart from or prior to *en banc* resolution. Nor was there any mention of their participation in the final *en banc* decision despite some concern over the question of tie votes in circuits having an even number of active judges.[15]

Furthermore, Judge Maris, whose proposal in 1944 as Chairman of the Judicial Conference Committee on the Revision of the Judicial Code constituted the genesis of Section 46(c),[16] has described the Third Circuit *en banc* procedure as involving only the permanent active-service members of that court. *Hearing and Rehearing Cases in Banc,* 14 F.R.D. 91. Not once does he suggest that retired judges, like Judge Medina here, may participate in any phase of the *en banc* adjudication.[17] *Ibid.*

---

[15] See also H. Rep. No. 1246, 77th Cong., 1st Sess., and Annual Report of the Attorney General (1939), pp. 15–16. It is to be noted that, at present, the Second, Sixth and Seventh Circuits are authorized an even number of active judges (6). 28 U.S.C. 44(a).

[16] See *Western Pacific Railroad Case*, 345 U.S. 247, 253–254.

[17] Respondents attempt to show that the Third Circuit practice is otherwise by reliance on *Bishop* v. *Bishop*, 257 F. 2d 495 (C.A. 3). In that case, Judge Magruder sat on the panel by designation. On a subsequent petition for rehearing (not *en banc*), the original panel concluded that nothing new was presented by petitioner and denied the petition. In this denial, it was noted that four circuit judges had not requested

B. Other provisions of the judicial code

The heavy reliance by respondents and the majority below on provisions of the Judicial Code other than Section 46(c), provisions having nothing to do (in our view) with *en banc* determinations, is clearly misplaced. Respondents claim[18] that 28 U.S.C. 43(b), 294(b), and 296 indicate a congressional purpose to equate the status and powers of all federal judges who are designated and assigned to duty on a court of appeals with the status and powers of the active circuit judges of that court. From this premise, respondents urge that Judge Medina, while not an active Second Circuit judge on the date of *en banc* decision, had the power under the designation and assignment provisions of the Judicial Code to participate in that decision.

Section 43(b) (App., *infra*, p. 30) provides, in essence, for two classes of court of appeals judges: (1) the circuit judges of the circuit in active service, and

---

rehearing *en banc*. 257 F. 2d at 502. Judges Biggs and Hastie dissented and expressed their views as to why they would grant rehearing *en banc*. There is nothing whatever to indicate, as respondents suggest, that Judge Magruder took part in anything but denial of the petition for panel rehearing or that he was given voice on whether rehearing *en banc* should be granted. The case was apparently submitted to the active judges in accordance with the Third Circuit's normal practice.

Our view of the Third Circuit practice is confirmed, moreover, by Judge Maris' action in the recent steel injunction case where, since he was retired at the time, he did not participate in the Third Circuit's decision whether to rehear *en banc*, and such rehearing was denied by an equally divided court. *United States* v. *United Steelworkers of America*, 271 F. 2d 676, affirmed, 361 U.S. 39.

[18] See also the opinion of the majority below (R. 139).

(2) those justices and judges designated and assigned who shall also be competent to sit as judges of the court of appeals. Section 294(b) (App., *infra*, pp. 30–31) specifically permits the designation and assignment of retired federal judges to a court of appeals. Section 294(c) (App., *infra*, p. 32) provides that no retired judge shall perform judicial duties except when designated and assigned. Finally, Section 296 (App., *infra*, pp. 32–33) confers on the designated and assigned judges "all the powers of a judge of the court, circuit or district to which he is designated and assigned * * *"[19] and the power to "decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters."

Analysis of these provisions, we submit, reveals that they did not confer on Judge Medina the power to participate in the *en banc* decision, which power he did not have under 28 U.S.C. 46(c). Section 43(b) indicates only that there are two types of circuit court judges and in no way suggests complete equalization of status and authority to act. Indeed, in making separate reference to active judges and to designated-and-assigned judges, Section 43(b) suggests that where another statutory provision, such as 28 U.S.C. 46(c), specifically limits authority to act to active circuit judges of the circuit, those other judges who are designated and assigned are to be excluded.

It is Section 296, *infra*, pp. 32–33, that constitutes the

[19] An exception is made for powers not relevant here.

heart of respondents' contention since it purports to grant to designated-and-assigned judges the powers of a judge of the court of appeals to which they are designated and assigned and to join in final disposition of all matters submitted to them during the period of designation. But this Section must be read as confining the powers it grants to those not specifically restricted elsewhere, as under Section 46(c) involved here, to active circuit judges of the circuit.[20] Otherwise, these restrictive provisions would be meaningless. Moreover, respondents' suggested interpretation overlooks the fact, of which the statutory draftsmen must have been aware, that a judge cannot become an active judge by designation and assignment.[21]

That Section 296 cannot support Judge Medina's participation in the *en banc* decision is further shown by the fact that any argument based on this provision applies as well to *all* other federal judges who, under

[20] Section 46(c) is not unique in restricting power or status to active circuit judges of the circuit. Thus, 28 U.S.C. 45 (c) and (d) (App., *infra*, p. 30) permit only active service judges of courts of appeals to replace that court's chief judge in prescribed circumstances. 28 U.S.C. 295 (App., *infra*, p. 32) requires the consent of the chief judge or judicial council of the circuit for designation and assignment of active service judges alone. And 28 U.S.C. 332 and 333 (App., *infra*, p. 33) provide for a judicial council and conference of each circuit composed of judges in active service.

[21] It is significant to note that Section 294, dealing in subsection (b) with designation and assignment of retired judges (App., *infra*, pp. 30–31), is captioned and deals exclusively with assignment to *duties*. It is also significant that Section 296, with respect to its grant of powers to designated-and-assigned judges, was part of the Judicial Code prior to enactment in 1948 of the *en banc* statute.

Section 294, may be designated and assigned. Hence, it would follow from the acceptance of respondents' position that retired District Judge Leibell, who sat by designation and assignment on the panel decision below, was qualified to participate in each phase of the *en banc* proceeding here. The same would be true of a circuit judge from another circuit, sitting by assignment, or of an active district judge. We would think that even respondents would admit that Congress did not intend this result.

Respondents' attempt to analogize the *en banc* problem here with cases involving panel or trial court situations is also lacking in merit. The cases in the latter category to which they point involve solely the question of the validity of designation and assignment which, if present, clearly authorize judicial action in those instances.[22] Designation and assignment here, however, affords no bridge to qualification in view of the explicit active service restriction of Section 46(c).[23]

---

[22] *E.g.*, *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 266 F. 2d 427, 430 (C.A. 3); *McDowell* v. *United States*, 159 U.S. 596; *United States* v. *Marachowsky*, 213 F. 2d 235 (C.A. 7); *Sunrise Mayonnaise* v. *Swift & Co.*, 88 F. Supp. 187, 189 (E.D. Pa.).

[23] There have been no decisions treating the precisely identical *en banc* issue posed in this case. It is true that two Ninth Circuit cases involved the same retirement factual pattern as presented here. In one, *In re Sawyer*, 260 F. 2d 189, 903, fn. 17, reversed, 360 U.S. 622, Chief Judge Denman presided at the oral argument of the case heard *en banc*. He retired between the date of hearing and the date of decision and thereupon withdrew from participation in the *en banc* decision. Judges Bone and Orr, on the other hand, participated in an *en banc* decision after retiring just prior to its rendition. *Herzog* v.

II. Judge Medina's participation in the *en banc* decision below, contrary to the mandate of Section 46(c), renders that decision void

The participation of a retired circuit judge in the *en banc* decision in this case contrary to the controlling statutory provisions—a participation which tipped the scales and resulted in an overruling of the Second Circuit precedents in this field, *Sword Line* and *American Eastern*—rendered the *en banc* decision of July 28, 1958, void. This Court has consistently ruled that, whenever a judge acts beyond

---

United States, 235 F. 2d 664, 670, fn., certiorari denied, 352 U.S. 844. Neither of these decisions included any discussion on the issue presented under 28 U.S.C. 46(c).

The related question of whether a retired circuit judge (*i.e.*, already retired before the three-judge panel hearing) may participate in the decision whether to rehear *en banc* under Section 46(c), has been answered in the negative by Chief Judge Duffy of the Seventh Circuit. *G. H. Miller & Co.* v. *United States*, 260 F. 2d 286, certiorari denied, 359 U.S. 907; *United States* v. *Gordon*, 253 F. 2d 177. In both of these cases, Judge Duffy ruled that retired Judge Major, who had been assigned to sit on the three-judge panel, could not participate in subsequent *en banc* proceedings under 28 U.S.C. 46(c). Judge Schnackenberg dissented on grounds similar to those adopted by the majority below. 260 F. 2d at 291–293.

In the only other reported decisions on this related issue of the right of a retired judge to vote for or against the grant of a petition for rehearing *en banc*, two Fifth Circuit cases appear inconclusive. *Commercial Nat. Bank in Shreveport* v. *Connolly*, 177 F. 2d 514; *United States* v. *Sentinel Fire Ins. Co.*, 178 F. 2d 217. In both cases petitions for rehearing *en banc* were denied *per curiam*. The four active circuit judges were evenly divided on whether the petitions should be granted. Judge Hincks, below, draws the inference that the fifth judge—retired Judge Sibley—must have voted for denial of that petition (R. 138–139). Judge Clark infers, however, that Judge Sibley did not participate and that the petitions were denied for lack of a majority in favor of granting (R. 140).

the powers conferred upon him by statute in a particular case, the decision rendered by him or in which he took part is a nullity. As a result, the invalid *en banc* determination below must be vacated and the cause remanded to the Second Circuit for further *en banc* proceedings.

In *American Construction Company* v. *Jacksonville Railway,* 148 U.S. 372, this Court was faced with the same issue of the effect on an appellate decision of participation in that decision by a judge allegedly rendered incompetent to vote by statute. There, Circuit Judge Pardee had taken part in a decree of the Circuit Court of Appeals reviewing an order setting aside an order originally entered by him as trial judge. The question, analogous to that here, was whether he was prevented from taking part in the appellate proceeding by virtue of statutory provisions barring participation by a judge in the review of causes upon which he sat as trier. This Court ruled in unequivocal fashion and in terms fully applicable here (148 U.S. at 387):

> * * * If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or *certiorari.* * * *

Subsequently in *Johnson* v. *Manhattan Ry. Co.,* 289 U.S. 479, the Court had occasion to consider whether applicable statutory provisions permitted a circuit judge to assign himself as trier of particular causes in the trial court. The District Court ruled that the

statute conferred no such power on the appellate judge and that therefore, any action taken by him in a cause to which he had assigned himself was void. The Court of Appeals reversed, and its decision was upheld by this Court on the ground that the statute authorized such special assignment by the circuit judge. Had the Court found such statutory authority lacking, however, its opinion leaves no doubt that the result in the District Court would have been reestablished.

Finally, in *Frad* v. *Kelly*, 302 U.S. 312, the issue was once again before this Court. In that case a district judge conducted a hearing and concluded a criminal proceeding by sentencing while sitting by designation and assignment in another district. After returning to his own district, he subsequently entertained a petition in the case for discharge from probation and termination of proceedings under provisions of the Probation Act. The question presented was whether such action was prohibited under other Probation Act provisions which assertedly limited the authority to act to the judge of the district in which the proceeding was brought. The Court held that his action was prohibited by statute, and, consequently, that the discharge from probation and termination of proceedings was a nullity. 302 U.S. at 316.

Similarly, state courts have consistently vacated judgments as void because of participation in that judgment by a judge rendered incompetent to take part in a specific proceeding by a statutory restriction. *E.g.*, *People* v. *Bork*, 96 N.Y. 188; *Watson* v. *Payne*, 94 Vt. 299; *Case* v. *Hoffman*, 100 Wis. 314, 352–

358. In so holding, the controlling rule was expressed by the Vermont Supreme Court as follows (94 Vt. at 301):

> * * * [W]here it is expressly declared by constitutional or statutory provision that in certain specified cases a judge shall not sit or shall not act, *or shall take no part in the decision* [emphasis added], the authorities are almost uniform to the effect that any judgment rendered by such judge in such case is *coram non judice*, and void. * * *[24]

And both the Vermont and Wisconsin Supreme Courts observed that, with regard to appellate tribunals, the rule was applicable whether or not, as here, the vote of the judge barred from participation by statute was decisive. *Watson* v. *Payne*, *supra*, at 301–302; *Case* v. *Hoffman*, *supra*, at 356–357.

In view of these decisions, any reliance by respondents on the theory that Judge Medina's participation in the *en banc* decision below was that of a "de facto" judge, and hence valid, is wholly incorrect. The "de facto" principle, in essence, has been applied where, unlike the case here, the judge's right to office is in question,[25] or where, also unlike this situation, there

[24] See also, *Case* v. *Hoffman*, *supra*, at 352–358; *People* v. *Bork*, *supra*, at 199; *In re Woodside-Florence Irrigation District*, 121 Mont. 346, 358–359.

[25] There is no dispute here over Judge Medina's status at the crucial moment of *en banc* decision: he was a retired, non-active judge. The only question presented, comparable to the questions in *American Construction Company* v. *Jacksonville Railways*, *Johnson* v. *Manhattan Ry. Co.*, and *Frad* v. *Kelly*, *supra*, is whether, as a retired judge on July 28, 1958, he had the power to decide this case under the provisions of 28 U.S.C. 46(c).

has been an attack on some formal defect in a judge's authorization to act, such as in the case of designation and assignment.[26] The "de facto" doctrine does not reach the situation, such as the instant case, where a judge is expressly precluded from a specific type of judicial action by legislative mandate. Were it otherwise, judges might then exceed their constitutional and statutory authority to act with impunity, and the legislative prohibition of provisions like Section 46(c) would be completely undermined.

---

[26] E.g., *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 266 F. 2d 427, 430 (C.A. 3); *Ball* v. *United States*, 140 U.S. 118; *Ex parte Ward*, 173 U.S. 452; *McDowell* v. *United States*, 159 U.S. 596; *United States* v. *Marachowsky*, 213 F. 2d 235 (C.A. 7); *Luhrig Collieries Co.* v. *Interstate Coal & Dock Co.*, 287 Fed. 711 (C.A. 2); 144 A.L.R. 1207.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the *en banc* judgment below of July 28, 1958, is void and should be vacated and the case remanded for further proceedings to be held in conformity with the mandate of 28 U.S.C. 46(c) restricting the authority to act to active circuit judges of the Second Circuit.[27]

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

ALAN S. ROSENTHAL,
HERBERT E. MORRIS,
Attorneys.

MARCH 1960.

[27] Since the last valid order entered below was the decision to grant rehearing *en banc* on December 19, 1957, the Second Circuit may now permit reargument of the cause *en banc* and a new determination by the present active membership. On the other hand, it is within the power of the active judges on remand to determine that, as Judges Clark and Waterman suggested below (R. 140), a judgment of affirmance of the district court decrees may now be entered based on the equally divided vote of the qualified *en banc* participants on July 28, 1958. See *Case* v. *Hoffman*, *supra*, at 359–360.

APPENDIX

28 U.S.C. 43 provides in pertinent part:

* * * * *

(b) Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court.

28 U.S.C. 45 provides in pertinent part:

* * * * *

(c) If the chief judge desires to be relieved of his duties as chief judge while retaining his active status as circuit judge, he may so certify to the Chief Justice of the United States, and thereafter the circuit judge in active service next in precedence and willing to serve shall be designated by the Chief Justice as the chief judge of the circuit.

(d) If a chief judge is temporarily unable to perform his duties as such, they shall be performed by the circuit judge in active service, present in the circuit and able and qualified to act, who is next in precedence.

28 U.S.C. 294 provides[1] in pertinent part:

* * * * *

(b) Any retired circuit or district judge may be designated and assigned to perform such judicial duties in any circuit as he is willing to undertake. Designation and assignment of such

[1] The provisions of 28 U.S.C. 294 set forth above are those which were in effect on July 28, 1958, the date of the *en banc* decision here. See 28 U.S.C. 294 (1952 ed.—Supplement V). Subsequent amendments were made in phraseology. See 28 U.S.C. 294 (1958 ed.).

judge for service within his circuit shall be made by the chief judge or judicial council of the circuit. Designation and assignment for service elsewhere shall be made by the Chief Justice of the United States.

Any retired judge of the Court of Claims (1) may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit as he is willing to undertake, and (2) may be called upon by the chief judge of the Court of Claims to perform such judicial duties in such court as he is willing to undertake.

(c) Any retired judge of any other court of the United States may be called upon by the chief judge of such court to perform such judicial duties in such court as he is willing to undertake.

(d) The Chief Justice of the United States shall maintain a roster of judges who have retired from regular active service but who are willing and able to undertake special judicial duties from time to time, which roster shall be known as the Roster of Senior Judges. Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title but is willing and able to undertake special judicial duties from time to time either in a particular court or courts specified by him or generally in any court may so indicate by requesting the Chief Justice of the United States to place his name upon the Roster of Senior Judges as available for such duty. The Chief Justice shall remove from the Roster of Senior Judges the name of any such judge who is no longer willing or able to perform any judicial duties. Any retired judge whose name appears upon the Roster of Senior Judges shall be known as a senior judge, and may be designated and assigned by the Chief Justice of the United States to perform such judicial duties as he is willing

to undertake in any court of the United States other than the Supreme Court, upon presentation of a certificate of necessity by the chief judge of such court.

(e) No retired justice or judge shall perform judicial duties except when designated and assigned.

28 U.S.C. 295 provides[2] in pertinent part:

> No designation and assignment of a circuit or district judge in active service shall be made without the consent of the chief judge or judicial council of the circuit from which the judge is to be designated and assigned. No designation and assignment of a judge of the Customs Court in active service shall be made without the consent of the chief judge of such court.
>
> * * * * * *

28 U.S.C. 296 provides:

> A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.
>
> Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.
>
> A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, de-

[2] As with Section 294, we have set forth the provisions of 28 U.S.C. 295 as they appeared on July 28, 1958, the date of the *en banc* decision. See 28 U.S.C. 295 (1952 ed.—Supplement V).

cide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

28 U.S.C. 332 provides in pertinent part:

> The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.
>
> * * * * * *

28 U.S.C. 333 provides in pertinent part:

> The chief judge of each circuit shall summon annually the circuit and district judges of the circuit, in active service to a conference at a time and place that he designates, for the purpose of considering the business of the courts and advising means of improving the administration of justice within such circuit. * * *
>
> * * * * * *

28 U.S.C. 371 provides:

> (a) Any justice or judge of the United States appointed to hold office during good behavior who resigns after attaining the age of seventy years and after serving at least ten years continuously or otherwise shall, during the remainder of his lifetime continue to receive the salary which he was receiving when he resigned.
>
> (b) Any justice or judge of the United States appointed to hold office during good behavior may retain his office but retire from regular active service after attaining the age of seventy years and after serving at least ten years continuously or otherwise, or after attaining the age of sixty-five years and after serv-

ing at least fifteen years continuously or otherwise. He shall, during the remainder of his lifetime, continue to receive the salary of the office. The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires.

U.S. GOVERNMENT PRINTING OFFICE: 1990